3164

Office Supreme Court U. S.
FILED
NOV 4 1902
JAMES H. McKENNEY,
Clerk.

No. 332.

Brf. of Simmons for Appellees.

Filed Nov. 4, 1902.

Supreme Court of the United States.

No. 332.

HENRY B. F. MACFARLAND ET AL

vs.

EUGENE BYRNES ET AL.

Brief for Julius Schneider Et Al., Appellees,
Represented of Record by
Leo Simmons.

LEO SIMMONS,
Attorney for Appellees.

LAW REPORTER CO., PRINTERS, 515 FIFTH ST., WASHINGTON D. C.

Supreme Court of the United States.

No. 332.

HENRY B. F. MACFARLAND ET AL.

vs.

EUGENE BYRNES ET AL.

Brief for Julius Schneider Et Al., Appellees, Represented of Record by Leo Simmons.

STATEMENT OF CASE.

By act of March 3, 1899, Congress passed what is known as a bill to extend S street, and for other purposes.

By said act it was provided—

> "that of the amount found due and awarded as damages for and in respect to the land condemned for said street, at least one-half thereof shall be assessed against the pieces or parcels of lands abutting that portion of the street to be opened, and extending to a depth of two hundred feet from the building line of said Eleventh street as extended."

The act provides that the proceedings shall be as in chapter 11, R. S. D. C.

And a further provision was that the awards for damages should not be paid until the assessments for benefits were

levied and confirmed. And further, that when the benefits were confirmed—

> "they shall severally be a lien upon the land assessed, and be collected as a special improvement tax in the District of Columbia, and shall be *payable in five equal installments, with interest at four per centum per annum until paid.*"

No provision is made for the beginning of the interest, nor does the act state what is the length of time between the installments. The verdict of the jury was returned, and it appeared that assessments had been levied within an area of 200 feet of each side of the street in question, to the extent of $134,560. A ratification *nisi* was passed on March 19, 1900 (Rec., p. 12). Thereupon exceptions were filed upon the ground of unconstitutionality of the law; that the instructions of the court were erroneous, and that the *assessments far exceeded the benefits.*

The awards having been made and returned by the jury, and it appearing that the amount was only $269,120, instead of $310,000 as was estimated by the Commissioners; and it being desirable to take advantage of the verdict on account of the low price allowed, Congress, by the act known as an act to extend "Columbia Road" and for other purposes, which was passed on June 6, 1900, provided for the payment of said awards. Section 2 of said act reads:

> "That of the amount found to be due and awarded as damages for and in respect of the land condemned for extension of Columbia Road as herein provided, such amount thereof shall be assessed by the jury hereinafter provided, as benefits, *and to the extent of such benefits,* against those pieces or parcels of land on each side of said street," etc.

This act provides for public notice, and for an assessment to the extent of benefits found only. Entirely dispenses with said chapter 11 and provides in itself a full and complete law;

and among other things that the court might hear any objection made to any member of the jury and excuses such juror. And if the court should so direct, the proceeding should be in its presence. Sec. 4, act of June 6.

Section 6 provides that the court shall have power to hear and determine any objection which may be filed to said verdict or award, and to set aside and vacate same in whole or in part; to summon a new jury to assess the damages or benefits as the case may be, and if vacated in part, the residue of the verdict and awards as to the land condemned or assessed shall not be affected thereby. And it is further provided by said act of June 6, 1900, Par. 2, Sec 12:

> "The Commissioners of the District of Columbia are authorized and directed to make application to the Supreme Court of the District of Columbia holding a District Court, for the final ratification of the awards of the jury in respect to the land condemned for the extension of Eleventh street; *and said awards when so ratified shall be paid as provided by the act of March 3d, 1899, anything in said act to the contrary notwithstanding. And in the event that the assessments for benefits levied by the jury in relation to said Eleventh street shall, for any reason, be declared void, the said Commissioners of the District of Columbia are authorized and directed to make application to said court for the reassessment of* SUCH BENEFITS UNDER AND IN ACCORDANCE WITH THE PROVISIONS *of this act.*"

The appellants, on June 26, 1900, filed their motion to confirm both the assessment and awards, notwithstanding the objections (Rec., p. 45). And gave notice they would call the same for hearing on June 30. The case having been certified to Chief Justice Bingham, on July 3, he passed an order confirming the awards and declaring the assessments illegal, null and void (Rec., p. 45), and from which order this appeal is prosecuted. By examining the verdict it will be seen, without difficulty, that it is the most unequal assessment that could possibly have been made.

ARGUMENT.

The act of June 6, 1900, took effect on the 3d day of July, 1900, and repealed the act under which the assessments were levied, in so far as it relates to said assessments.

None of the provisions of the act of March 3, 1899, are in the act of June 6, 1900.

By the act of March 3, 1899, the court had apparently nothing to do but to ratify or vacate the awards and assessment; for the act does not require any action on the part of the court, except to confirm or reject the awards and assessments. It was the Supreme Court of the District of Columbia that should ratify the award of the jury. Said court found the assessments were *unreasonable, excessive, and exceeded the benefits.* The act of June 6 left it to the discretion of the Commissioners to make application at once or to wait until the law was settled, for there was no way the act of June 6, 1900, could be called into effect until such move was made by them. They saw fit in exercising their discretion to take this step, and on June 26, 1900, twenty days afther the passage of the act, made application for the confirmation of the awards and assessments, and the court for the reasons set out in the objections (the act provides for any reason) (Rec., p. 44), on the 3d day of July, 1900, declared the assessment illegal, null and void, set aside and vacated same, and at that time the act of June 6, 1900, took effect. The decree of the court (Rec., p. 46) recites said act of June 6 and proceeds under its provisions.

It will be seen that the two acts are by no means in harmony, and the old law was necessarily repealed by the new.

If the act of June 6 is to be construed in favor of persons upon whom assessments or burdens have been levied, it would certainly repeal the former act and take effect at the earliest period.

The intention to repeal the assessment clause of the act

of March 3, 1899, is manifest, though an intention to repeal a certain statutory provision may be inferred from radical changes or abolition of the leading parts to which they were conditions or ancillary.

Sutherland on Stat., Sec. 146. An amendment operates to repeal all of the section amended not in harmony with the amendment. Same authority. Basnet *vs.* Jacksonville, 19 Fla. 664; Nash *vs.* White's Bank, 37 Hun, 57.

> "Statutes which take away penalties, etc.; statutes which are in favor of those on whom taxes are assessed or burdens laid, or in favor of those who are subjected to prejudice by exercise of a special privilege granted by law, are remedial and are to be liberally construed. Where the intention is plain to confer a privilege upon those whose rights are affected by a statutory proceeding, in derogation of the right of personal property, and the language is doubtful as to the extent of the privilege, it is the duty of the court to give it the largest construction in favor of the privilege which the language employed will fairly permit."

Sutherland on Stat. 441, and cases cited.
Walker *vs.* Chicago, 56 Ill. 277.

Where the taking effect of an act depends on a condition, it will not take effect until the condition is fulfilled, but the condition being performed it will immediately take effect.

See Sutherland on Stat. 109.
Cain *vs.* Goda, 84 Ind. 209.
Welch *vs.* Battern, 47 Iowa, 147.
State *vs.* Donehey, 8 Iowa, 396.
Hunt *vs.* Murray, 17 Iowa, 313.
2 Ark. 260.

> "A statute is repealed without a special repealing clause where another law is passed upon the same subject, that is inconsistent to it.
> "Such repeals are recognized as intended by the

legislature, and its intention to repeal is ascertained as the legislative intent is ascertained in other respects, when not expressly declared by construction."

Sutherland on Stat. 138.

Thorp *vs.* Schooling, 7 Nev. 15.

"An implied repeal results from some enactment, the terms and necessary operation of which can not be harmonized with the terms and necessary effect of an earlier act.

"In such case the latter law prevails as the last expression of the legislative will; therefore, the former law is constructively repealed, since it can not be supposed that the law making power intends to enact or to continue to enforce laws which are contradictions. The repugnancy being ascertained, the latter act or provision in date or position has full force, and displaces by repeal whatever in previous law is inconsistent with it."

Sutherland on Stat. 138, and cases cited.

Wood *vs.* United States, 16 Pet. (U. S.) 342.

Dwarris Stat. 113.

Subsequent legislation repeals previous inconsistent legislation whether it expressly declares such repeal or not.

"In the nature of things it would be so, not only on theory of intention, but because contradictions can not stand together."

Sutherland Stat. 138, and citations.

No one will question the fact, that the act of June 6, 1900, is repugnant to and inconsistent to the act of March 3, 1899. And that the act of June 6 is a full and a complete law in itself; that upon certain conditions it was to take effect for the purpose of assessing the land in question, and if it did take effect it necessarily repealed the former law.

"While repeals by implication are not favored it is well settled that when the acts are not in all respects

> repugnant, if the latter act covers the whole subject of the earlier act and introduces new provisions which plainly show that the law was intended as a substitute for the first, it will operate as a repeal."
>
> King *vs.* Cornell, 106 U. S. 395.

In the case of the United States *vs.* Tynen, 11 Wall (U. S.), 88, the court said:

> "The act of 1813, declares that the fine when imposed, shall not be less than $500; the act of 1870 allows a fine as low as $300; Thus authorizing, which the first act declared shall not be done. When repugnant provisions, like these exist between the acts the latter act is held, according to all the authorities, to operate as a repeal of the first act. As the latter expresses the will of the Government as to the manner the offense shall be subsequently treated."

The above case was referred to and approved in District trict of Columbia *vs.* Hutton, 143 U. S. 18, where the act relating to appointment of police officers was held repealed by implication.

> See Nat Bank *vs.* Peters, 144 U. S. 570.
>
> See, also, United States *vs.* Affmosdt, 122 U. S. 197,

and cases cited by the court, including above.

> Tracy *vs.* Tuffly, 134 U. S. 206.

How could two statutes be more repugnant than the two in question? The act of March 3, 1899, declares that at least 50 per cent of the cost of opening the street shall be the amount assessed against the land. The act of June 6 declares that the assessment shall be to the extent of the benefits found, which may be less than 10 per cent of cost of land condemned. The act of June 6 provides for objections to any juryman and gives the court the power to have the proceeding in its presence, etc. The act of 1899 is en-

tirely silent as to when any of the assessments for benefits shall be paid. It declares they shall:

"*Be payable in five equal installments.*" Of what period? *What is certain about the assessment?* When would they start to pay? And when would the second installment be due? No time is fixed and the party assessed might well say: "I am not ready to pay the second installment." Congress meant to remedy this, for by the latter act it is provided:

> "And shall be payable in four (not five) equal annual installments, with interest at 4 per cent from date of confirmation."

Thus we have in the latter act a definite time for the interest to begin, a definite time for the second installment and each of the two following. As to the uncertainty of the act of March 3, in relation to the time for payment of assessment, I shall treat later on.

And I submit that the laws in question should be construed as if they were penal statutes; for they are orders or directions from the supreme authority to its officer to do certain things whereby an assessment is levied or a penalty is imposed. It is not like a statute that would affect or interfere with rights between individuals. The act of June 6, 1900, was a direction from the legislative power to its officers to do a certain thing, and it was for the legislative body to decide if it was willing under certain conditions to abandon the old act and substitute the new. And so, with a criminal prosecution, it is the law-making power that has decided the steps to be taken and directs their execution.

Can the appellants say:

We will prosecute the case to the court of last resort under the old law, and if we fail, we will then take the new.

Suppose the Court of Appeals had been sustained in the case of Wright v. Davidson, would they have carried the case to the court of last resort before taking up the new law?

Congress did not leave the question of the validity of these assessments to the constitutionality of the law only, but provided that if the assessment should be held *void for any reason*, the new law should take effect. Besides those appearing there are many reasons assigned in the record why these assessments should not be ratified, and the presumption is that the court below found each to exist; and it is a well-known principal that if the lower court sets aside a verdict of this kind, the appellate court will not disturb the decree, if there is any possible ground to place it upon. THE LOWER COURT SIMPLY GRANTED A NEW TRIAL TO THE APPELLEES.

> "The effect of a repealing statute is to obliterate the former law as completely from the records as if it had never existed. *Except* for the purpose of those actions that were *commenced, prosecuted and concluded while it was an existing law.*"
>
> See Inwagen *vs.* Chicago, 61 Ill. 31.
> Ray *vs.* Goodman, 4 Moore and P. 34.
> Dwarris Stat. 676.
> Throm *vs.* San Francisco, 4 Cal. 165.
> Ex parte McCardle, 74 U. S. 514.

> "No right can be said to have accrued under a statute, unless before its repeal such rights were carried to judgment."
>
> Gregory *vs.* Bank of Denver, 3 Col. 332.
> Gaul *vs.* Brown, 53 Me. 496.
> Carts *vs.* Leonvitt, 15 N. Y. 152.
> Nichol *vs.* Squire, 5 Pick. 168.
> See Norris *vs.* Crocker, 54 U. S. (13 How.) 429.

"Pending judicial proceeding based upon a statute. If it appears even in a court of last resort, that pending the appeal a statute, that was necessary to support the judgment of the lower court has been repealed, the judgment will be reversed."

State *vs.* Daley, 29 Conn. 272.
Gilliad *vs.* Schuyler, 9 Kan. 387.
McMinn *vs.* Bliss, 31 Cal. 122.
Keller *vs.* State, 12 Md. 323.
Price *vs.* Nesbit, 29 Md. (new), 263.
Mayor of Annapolis *vs.* State, 30 Md. 112.
Wade *vs.* St. Mary's School, 43 Md. 178.
Shepard *vs.* State, 1 Tex. App. 506.
Montgomery *vs.* State, 2 Tex. App. 618.
Hubbard *vs.* State, 2 Tex. App. 506.
United States *vs.* Peggie, 5 U. S. (1st Cranch), 103.

"If a statute giving a special remedy is repealed without a saving clause in favor of pending suits all suit must stop where the repeal finds them."

South Carolina *vs.* Gaillard, 101 U. S. 433.

"When an action for recovery of a penalty provided by an act is pending at the time of the repeal of such act, the repealing act is a bar to the action."

Norris *vs.* Crocker, 13 How. (U. S.) 429.

It will be seen by the twelfth section of the act of June 6, 1900, that the law was made applicable to the opening of many other streets; will it be contended that the act of March 3, 1899, is still in force as to *those*? The only difference in the law as to *those* streets and the one in question, is that as to the former it was to take effect upon its passage, and as to the latter on a certain condition.

"It has been frequently recognized in admiralty causes, when property was seized and condemned, and the law was repealed before decision of the court,

the court above removed the penalty, and that the court in disposing of the appeal or writ of error must decide according to existing law at the time of judgment."

Killer *vs.* State, 12 Md. 325.

Citing 5 Cr. 281 (6 Cd. 203), 3 Pet. 57, Marshall, J.

Mayor of Annapolis *vs.* State, 30 Md. 112.

"The same principle appears when a law is repealed or expires pending an appeal or writ of error, from a judgment of an inferior court, because the decision must be in accordance with the law at the time of the final judgment."

Citing Marshall, J., in 1 Cr. 110.

In Wade *vs.* School, 43 Md. (case under condemnation proceeding), holding that the new law repeals the former, pending proceeding: "No person has a vested right in any case or proceeding."

Endlich on Stat. 285.

If assessment shall for any reason be declared void, must mean when declared void by the court of original jurisdiction, "*When a judgment is obtained means when any judgment is obtained in a court of competent jurisdiction.*"

McGovern *vs.* Connell, 43 N. J. Law, 108.

"An act may be passed to take effect not only at a future day certain, but also upon the happening of a future contingency.

"In the former case it takes effect on the day fixed, but in the latter it takes effect upon the happening of the contingency."

Endlich on Stat. 449.

Thus, where an act provided for an election, "after the present war was over," it was held to go into effect only

after the President's proclamation that the war had ceased.

Conley *vs.* Sup. Calhoun Co., 2 W. Va. 418.
See, also, 420 Weekly Note Cases, Phila (Pa.) 226.

Congress may suspend a law, to be revived on the happening of a contingency, and it will take effect from the occurrence of such.

The Aurora *vs.* United States, 7 Cr. (U. S.) 382.

> "When the law is made to take effect on the happening of such an event, the legislation in effect declares the law inexpedient if the event should not happen, but expedient if it should happen."
>
> Clark *vs.* City of Rochester, 24 Barb. 490, 498.

The act of June 6 was a full law from the time of its passage, and took effect wholly the moment it could have been resorted to for any proceeding. And can it be said that when the court vacated the former assessments, it could not, under a proper petition of the Commissioners, have proceeded under said act to assess the land as therein provided.

Clark *vs.* Rochester, 24 Barb. 490.

Statutes speak from the time they take effect, and from that time they have posteriority.

Sutherland on Stat. 160.
Endlich on Stat. 479.

In the case of Miller *vs.* Mayor of New York, 109 U. S. 384, this court said:

> "The efficiency of an act as a declaration of legislative will, must of course come from Congress, but the ascertainment of the contingency upon which the act shall take effect, may be left to such agency as it may designate."
>
> See U. S. *vs.* Bloomfield, 81 Fed. 252.

In the case of Field *vs.* Clark, 143 U. S. 649, the court said, referring to the acts of the President:

> "He was the mere agent of the law-making department to ascertain and declare when the law should take effect."

And so with the case at bar, the lower court was to decide upon the application of the Commissioners, whether or not it would declare the assessments void, set them aside, and when it did so it put the new law into effect. It matters not even if an error was committed, the law followed the judicial decree as a matter of course, as with the proclamation of the President under the law giving him the power to direct—

> "Upon satisfactory evidence being given the President of the United States by the government of any foreign nation, that no discriminating duties, etc., are imposed or levied, etc., upon vessels wholly belonging to citizens of the United States, the President is hereby authorized to issue a proclamation declaring that foreign discriminating duties, etc., in the United States shall be suspended," etc.
>
> Field *vs.* Clark, supra.

Could it be claimed, if the fact supposed to exist at the time the President made use of such proclamation, did not so exist, and an error was thereby committed, the act, for that reason, would not be effective?

The act of June 6, 1900, specifically declares that—

> "In the event that the assessments for benefits levied by the jury in relation to said Eleventh street shall, *for any reason*, be declared void, the Commissioners of the District of Columbia are authorized and *directed* to make application to the said court for the reassessment of such benefits under and in accordance with the provisions of this act."

So it will be clearly seen that Congress intended that the act should take effect in case the assessments then

levied should be declared void and set aside **for any reason.** In other words, if the assessments returned by the jury on the 16th day of February, 1900, (Rec., p. 53) should be declared void for *any reason*, then the act of June 6, 1900, should take effect. And certainly if the owners of the property assessed are entitled to a new jury under the old law, as held in the case of Brown *vs.* McFarland, 30 Wash. Law Rep., p. 235, and Todd et al. *vs.* McFarland, Vol. 30, No 8, Wash. Law Rep., p. 423, the assessments have to be set aside and necessarily become void. And when that occurs, the act must necessarily take effect.

The exceptions and objections to the verdict in this case were filed after the act of June 6, and in contemplation of law Congress must have known that the property owners had a right to have those assessments declared void and set aside on objections being made thereto. When the objections were made, according to the ruling in Brown *vs.* McFarland, and Todd et al. *vs.* McFarland, *supra*, the assessments *ipso facto* became *void*, from that time, because they could not be enforced or confirmed. If a new jury is to be ordered, as the Court of Appeals has decided, how can the proceedings be under any other statute than the act of June 6, 1900, for clearly the old assessments, which Congress refers to in said act, cannot exist, or certainly will not exist when a new jury is ordered. If the assessments were not void, in the strict legal sense, they were certainly voidable, and the words,—"void for any reason" used in the statute must mean in case the assessments then levied and existing could not be confirmed.

Void may mean absolutely void, or voidable only; but it is very properly applied to things that are avoidable. By Anderson's Dictionary of Law, page 1092, it is given as something incapable of confirmation or ratification. In the case of Somers *vs.* Brewer, 2 Pick. (Mass.) 184, Mr. Justice Parker said, speaking of the definition of the word void—

> "What may be avoided may in good sense to this purpose be called void, and this use of the term void is not uncommon in the language of statutes and courts."

I submit, therefore, that the words of the statute are as plain as they can be, and it was clearly intended that if the assessments levied by a former jury, and then existing in relation to Eleventh street, were set aside, the act of June 6 should necessarily take effect.

Said act took effect upon its passage, to a certain extent; for the act of 1899 provided that the awards for damages should not be paid until the assessments for benefits were confirmed; while the act of June 6, 1900, declared that the awards for damages should be paid immediately on the confirmation of same, "anything in the former act to the contrary notwithstanding." Certainly this was a repeal of so much of the act of 1899 as prevented the payment of the awards until the assessments were confirmed.

This statute must be construed in favor of the parties upon whom penalties are imposed.

> Southerland on Statutes, 441, and case cited.
> Walker *vs.* Chicago, 56 Ill., p. 277, and cases cited.

The Court of Appeals, in delivering its opinion in this case, seems to have been under the impression that it was a question of whether or not there was any necessity for the act of June 6, 1900, to take effect. They say (Rec., p. 77):

> "By the act of Congress of June 6, 1900, already mentioned, it is provided that, if for any reason the assessments for benefits should be declared void, the Commissioners should make application to the court for reassessment. This evidently has no reference to the invalidity consequent upon the judicial decision of the unconstitutionality of the act of March 3, 1899, for there could be no reassessment since the whole proceeding would fail."

This is just what the appellees contend, that it made no difference for what reason the assessment then existing should be vacated; upon the court so declaring them void and vacating them, as it did, the new act must by any construction take effect.

Continuing the court said—

> "the holding of this court, that the act of March 3d, 1899, was unconstitutional did not therefore avail to set in motion the instrumentalities of the act of June 6, 1900, for reassessment, and when the Supreme Court of the United States held the act of 1899 to be a constitutional and valid exercise of legislative authority all reason for the reassessment under the act of 1900 vanished."

The appellees never contended that any act of the Court of Appeals or this court set the act of June 6 in motion; but that the action of the lower court did, and that it was not a question of necessity, as to whether or not the law took effect, the question is, what was done; what effect did the action of the trial court have upon the statute. It did just what the act said should be done to put in motion the new law and whether or not it was error to do so makes no difference. The act either took effect or it did not. If it took effect nothing but a repeal of it could prevent its effect.

The Assessing Clause of the Eighth Section of the Act of March 3, 1899, is Void for Uncertainty.

The act under which the assessments were levied, approved March 3, 1899, has the following provision in relation to the assessments for benefits:

> "SEC. 8. When confirmed by said court the assessments shall severally be a lien upon the land assessed and be collected as special improvement tax in the District of Coulumbia, and shall be payable *in five equal installments, with interest at four per centum per annum until paid.*"

The assessments referred to, and which were attempted to be levied, necessarily depend for validity upon the assessing clause of said statute, and if the enactment under which the assessments were levied (or are to be levied) is incapable of enforcement by reason of any omission or mistake in the wording thereof, then it is necessarily inoperative and void. For certainly a statute that can not be enforced, is no law at all.

The wording of the act, "payable in five equal installments," means nothing. There is nothing certain about it. Five equal installments may mean installments of a day, week, month, year, ten or a hundred years. Certainly no one could be required to pay the tax at any time, because the amount attempted to be levied as a tax will never be due. If the knowledge of what was intended can not be gained or ascertained from the statute itself, there is no way to aid it, and therefore such enactments must fail for want of certainty. There is no time mentioned for the payment of the first, second, third, or fourth installment of the alleged tax. Such being the case, when could payment be legally demanded? STATUTES MUST BE CAPABLE OF CONSTRUCTION AND INTERPRETATION, OTHERWISE THEY ARE VOID.

> "The court must use every authorized means to ascertain and give it an intelligible meaning, but if after such efforts it is found to be impossible to solve the doubt and dispel the obscurity, if no judicial certainty can be settled upon as to the meaning, the court is not at liberty to supply or make one. The court may not allow conjectural interpretations to usurp the place of judicial exposition. There must be a competent and efficient explanation of the legislative will."
>
> State *vs.* Partlow, 91 N. C. 550.

"Acts of the legislature should be plain and not

couched in such a way that they can not be understood and readily construed."

Hughes Case, 1 Bland, 46.

Endlich on Stat. 24, and case cited.

McCondville *vs.* Mayor of Jersey City, 39 N. J. 38.

Ward *vs.* Ward, 37 Tex. 389.

Commonwealth *vs.* Bank, 3 Watt. and Serg. (Pa.) 173; 23 Am. & E. E. of Law (1st Ed.), 301, note.

See, also, 57 Mo. 25.

"Whether a statute be a public or private one, if the terms in which it is couched be so vague as to convey no definite meaning to those whose duty it is to execute it, either ministerally or judicially, it is necessarily inoperative."

Drake *vs.* Drake, 4 Dev. (N. C.) 110.

In the case of Blanchard *vs.* Spirges, 3 Sum. 280, a case wherein the time for expirations of a patent was extended, the act referred to a patent issued on a different date and it had a number different from the one thought to be intended, the court said, Story, J:

"The descriptive words constitute the very essence of the act, unless the description is so clear and accurate as to refer to the particular thing intended, and be incapable of being applied to any other, the mistake is fatal.

"On the whole, although I can not doubt, as a private man, what patent was intended to be renewed by Congress yet I do feel great doubt whether judicially, I am at liberty to depart from the very words of the act of Congress to correct a mistake not apparent upon the face of the act when the mistake when corrected, will still leave another doubt behind it, and that whether I do not, by such correction, depart from the intention of Congress manifested."

In the case of United States *vs.* Union Pacific R. R. Co., 91 U. S. 85, the court said:

> "In support of this construction, it is sought to give the word 'maturity' a double signification, applying it to each payment of interest as it falls due, as well as to the principal. But this is extending the operation of words by a forced construction beyond their natural and ordinary meaning, which is contrary to all legal rules. Courts can not supply omissions in legislation, nor afford relief because they are supposed to exist. 'We are bound,' said Justice Buller, in an early case in the King's Bench, 'to take the act of Parliament as they have made it; a *casus omissus*, can, in no case, be supplied by a court of law, for that would be to make laws; nor can I conceive that it is our province to consider whether such a law that has been passed be tyrannical or not.'"
>
> Jones *vs.* Smart, 1 Term. Rep. 44.

Lord Chief Baron Eyre, in the case of Gibson *vs.* Minet (1 H. Bl. 569–614), said:

> "I venture to lay it down as a general rule, respecting the interpretation of deeds, that all latitude of construction must submit to this restriction, namely, that the words *may* bear the sense, which, by construction, is put upon them. If we step beyond this line, we no longer construe men's deeds, but make deeds for them. This rule is as applicable to the language of a statute as to the language of a deed."

And in the case of Hobbs *vs.* MacLeon, 117 U. S. 567, the court said:

> "When a proposition is left out of a statute, either by design or mistake of the legislature, the courts have no power to supply it. To do so would be to legislate and not to construe. We are bound, says Mr. Justice Buller, in Jones *vs.* Smart, 1st T. R. 44, to take the act of Parliament as they have made it. And Mr. Justice Story, in Smith *vs.* Rines, 2 Summ.

354–355, observes: 'It is not for the courts of justice proprio marte to provide for all the defects or mischief of imperfect legislation.'"

See, also, Knight *vs.* Burwell, 12 A. & E. 460.
Lamon *vs.* Eiffe, 3 Q. B. 910.
Bloxam *vs.* Elsee, 6 B. C. 169.
Bartlett *vs.* Morris, 6 Port. Ala. 266.
Grace *vs.* Collector, 79 Fed. Rep. 318.

And in the case of United States *vs.* Goldenburg, 168 U. S. 102, the court said:

"No mere omission, no mere failure to provide for contingencies, which it may seem wise to have specifically provided for, justify any judicial addition to the language of the statute.

"Where the language is precise and unambiguous, but at the same time incapable of reasonable meaning, the act is consequently inoperative; a court is not at liberty to give the words, on merely conjectural grounds, a meaning which does not belong to them. In other words, where the language of a statute is so devoid of certainty as to render it impossible to ascertain the result intended to be achieved, it can not be assumed that it was intended to give the court, as the interpreter of the statute in the last resort, power to control the event."

Endlich on Interpret. of Stat., Sec. 24, and cases cited.

"Thus, where an act made warrants of attorney to confess judgment void as against the assignee of the bankrupt, if not filed within 21 days from execution, or unless judgment was assigned 'or' execution was 'issued' within the same period, the Court of Queens Bench refused to alter 'or' into 'and' and 'issued' into 'levied;' though the passage was unmeaning as it stood, and the proposed alteration would have given it effect, which, because rational, was probably, but only conjecturally, the effect intended by the legislature."

Green *vs.* Wood, 7 Q. B. 178.

In the case of Ward *vs.* Ward, 37 Tex. 389 (see page 392), referring to a statute that was incapable of enforcement, the court said:

> "We hesitate, and consider well, any judgment of ours which declares unconstitutional or void an act of the legislature, paying due deference to the learning and wisdom of that branch of the Government. But when we find ourselves totally unable to administer a law, by reason of its uncertainty or ambiguity, or believe it to be unconstitutional, we shall not hesitate to discharge the duty which the law devolves upon us.
>
> "We do not mean to say, by any means, that the act of November 1, 1871, is unconstitutional, but we do say that it is nugatory and void for want of some adequate provision in the law to carry out its execution."

In the case of Rex *vs.* Barnum, 8 B. & C. 59, the court said:

> "Our decision may, perhaps in this particular case, *operate to defeat the objects of the 59 G. 3, but it is better to abide by this consequence than to put upon it a construction unwarranted by the words of the act*, in order to give effect to what we may suppose to have been the intention of the legislature."

And in the case of Maxwell *vs.* State, 40 Md. 273, the court said, in relation to an act of the Maryland legislature:

> "Where the words of the act, as we have said, are plain and unambiguous; the legislature has declared that in the execution of this assessment law, all the property in the State shall be exempt from taxes except what is particularly mentioned.
>
> "It is very probable; nay, we feel quite sure, the legislature intended to say something very different. There has evidently been some mistake or omission, and we are asked to correct the mistake or supply what has been omitted in order to make the expression what we suppose to have been the intent of the legislature. *We certainly have no power or authority to do so.*"

And in the same case, citing Alexandria *vs.* Worthington, 5 Md. 485, quotes the following words:

> "We are not at liberty to imagine an intent, and bind the letter of the act to that intent; much less can we *indulge in the license of striking out and inserting and remodeling with the view of making the letter express an intent which the statute in its native form does not evidence.*"

And in another part of the opinion, the court quotes from Smith on Statutory and Constitutional Construction:

> "Courts must not, even to give effect to what they may suppose to be the intention of the legislature, put upon the provision of the statute the construction in support of the words, *even although the consequences should be to defeat the object of the act.*"

And again, in the same opinion, citing what was said in Woodbury & Company *vs.* Berry, 18 Ohio, 462:

> "We are satisfied by considerations outside of the language, that the legislature intended to indicate something very different from what it did indicate. But it did not carry out its intention; and we can not take the will for the deed. *It is our legitimate function to interpret legislation, but not to supply its omission.*"

And in the same case the court said:

> "It requires no argument to prove that a law which exempts from taxation all the property in a State, except a small portion specified in the act, which only is thus by implication made subject to taxation, is unconstitutional and void, apart from the consideration, that among the property thus enumerated is some which the State has not the power to tax. On this ground, and because the assessment must receive this construction according to its plain and positive expression, it is our duty to declare that it is inoperative. It is evident that a mistake has occurred in drawing the law, something

has been omitted, but we can not correct the mistake or supply the omission. We are compelled to take the law as the legislature has indicated it. We have no power to change the words or add expressions in order to make it express what we suppose had been the intention of the legislature.

"*If they have failed to express their real intention, it is for them and not for the courts to amend the law and make it express the legislative will.*"

In the case of Commonwealth *vs.* Bank of Penn., 3 Watt & Sergeant's Reports (Pa.), *supra*, the court said, holding that a statute of the Pennsylvania Legislature incorporating a bank, was void for uncertainty:

"We have seldom, if ever, found the language of legislation so devoid of certainty as in the proviso before us."

And the latter part of same opinion:

"We are constrained, therefore, to say that no valid election has been held, and none can be held without further legislation."

In the case of Murphy and Coal *vs.* Enery, 77 Md. 86, it was said, affirming Maxwell *vs.* State, *supra*:

"It seems to be clear that what was intended was that some section of the ordinance referred to should be amended so as to read as set forth in section 2 of that act. But if this construction be adopted the act becomes void for uncertainty, for in the ordinance mentioned in section one of the act of 1892 there is no provision at all for which section 2 of this act could be substituted. It was doubtless intended to have refered to some other ordinance and it was stated in the argument that the ordinance to which reference should have been made in section one 'was one with a different number, approved on a different day, and relating to a different subject-matter.' *But as we are unable to ascertain from anything in the act itself what ordinance the legislature had reference to, the whole act becomes so uncertain that we can not do otherwise than declare it void.*"

The Court of Appeals, in the case of Todd et al. *vs.* MacFarland et al., Vol. 30 Washington Law Reporter, page 423, considering the provisions of a similar statute, held same to be so defective that payment of the assessment could not be enforced. Yet said court was of the opinion that said act could be perfected by new legislation and cited in support of its opinion the case of People *vs.* Lawrence, 36 Barb. N. Y. 177. Though I doubt the accuracy of the doctrine as laid down in said case (36 Barb.), yet that case is not similar and is not in point. There the assessments were regularly levied and the time for payment fixed; but no definite person was appointed to collect the amount levied.

While in this case the very foundation of the thing is defective, namely, the want of a definite time for payment.

If this defect vitiates the section of the statute, which contained the provision and made it void for want of certainty, in contemplation of law, there never was any assessment in existence, and how could the law be amended so as to relate back and make valid something that did not exist?

The Assessments are Unequal and the Verdict Clearly Shows that the Jury Acted Without any Care or Proper Consideration of the Matter, and the Trial Court's Order Vacating the Assessment was Proper for that Reason.

It seems incredible that a jury of intelligent men would have returned such an assessment. If the court will examine the verdict as to the east 14 feet 4 inches of lot 5 in block 27 (Rec., p. 60), it will find an assessment of $521 (which exceeds the value of the land), and on the east 14 feet 4 inches of lot 5 in block 26, both of which are similarly situated, there is an assessment of $87 only (Rec., p. 59).

And on lot 27, block 27, the amount assessed is $1,810 (Rec., p. 60), while on lot 4, block 26, just opposite, with same frontage, the amount assessed is only $377, or about one-sixth the amount on said lot 27 (Rec., p. 59).

Then take part of lot 30, block 27, we have a frontage on Eleventh street of 213 feet, and an assessment of $1,517 (Rec., p. 60), while on lot 1, block 26, with a frontage of 150 feet, a fraction over one-fourth less, is assessed only $804 (Rec., p. 59). The lot in block 27 is assessed at a fraction over $7 per front foot, while the one in block 26 about $5 per front foot; and the only difference in the situation, if any, is that the lot in block 26 is *a northwest corner, the most desirable situation that can be obtained for building purposes.*

Then take lot 27, block 27; this lot is 135 feet from the street; we have an assessment of $1,810 (Rec., p. 60), while lot 9 in square 12 (Rec., p. 61), Todd and Brown subdivision, which is less than 100 feet from the street, is assessed only to the extent of $338, or one-sixth of the amount of the lot in block 27.

And lot 22 in block 26 is 135 feet from the street (Rec., p. 59), same distance as lot 27 in block 27, and it is assessed at $301, and the situation as to desirability of both lots are identical. Lot 2 in block 27 is assessed at $2,130 (Rec., p. 60), while lot 2 in block 26 is assessed at $1,130 (Rec., p. 59). This is only a small number of such instances, as the court will see by examining the verdict. What is there in this record to show that the court did not come to the conclusion, that this assessment should be set aside for inequality? The trial court had full discretion in this regard.

The Section of the Act of March 3, 1899, Relating to the Assessment is Unconstitutional and Void.

This case is entirely different from the case of Wright *vs.* Davidson, decided by this court, 181 U. S. 371. The act relating to the assessment in that case reads as follows:

> "That of the amount found due and awarded as damages for and in respect of the land condemned under this section for the opening of said streets, not less than one-half thereof shall be assessed by the

> jury in said proceedings against *the pieces and parcels of ground situate and lying on each side of the extension of said streets, and also on all or any adjacent pieces or parcels of land which will be benefited by the opening of said streets as herein provided.*"

While that of the section relating to Eleventh street (the case at bar) is limited to 200 feet and reads:

> "That of the amount found due and awarded as damages for and in respect of the land condemned, under this act for the extension of said Eleventh street, at least one-half thereof shall be assessed by said jury in said proceedings against those pieces or parcels of ground abutting that portion of the street to be opened, and extending *to a depth of two hundred feet from the building lines of said Eleventh street as extended.*"

In the Davidson case this court said:

> "However, as we learn from this record that there are others than the appellees concerned in the question of the validity of the act of Congress, and as the decision of the Court of Appeals, by declaring the act void as to the appellees, operates to defeat or suspend proceedings under it, *and under other existing acts of Congress in similar terms*, respecting public improvements in the District, we prefer to pass by the question whether the appellees are estopped by having made the dedication imposed as a condition precedent to the openings of the streets, and to place our decision upon the question discussed by the Court of Appeals and which controlled its decision, namely, that of the constitutionality of the act of Congress under which the proceedings were had."

It can be plainly seen that the section under which the assessments were made in this case, is not in similar terms of that of the one in the Davidson case. By section 3 of the act of 1899, relating to the street in question, the assessing area is limited to 200 feet; while in section 1, relating to S street,

it is unlimited. The Davidson land could not have been assessed without benefits being found, for that land did not abut the land to be condemned; it fronted upon that part of the street which was donated. Section 2 of said act, relating to Sixteenth street, which had a limited area, has been repealed by section 12 of the act of June 6, 1900. And section 4, relating to New Hampshire avenue, had an unlimited area. So it will be seen that the assessment affecting the property in question is different from any other of said act.

The jury in the condemnation proceedings to extend Sixteenth street, made under the act of June 6, 1900, returned a verdict, by which it appears that damages to the extent of $729,952 were allowed and benefits assessed amounting to the sum of $108,834 only; a fraction over one-seventh, instead of one-half as in this case. I assume that the attorneys for the appellants will not deny this to be a fact. This clearly shows the injustice of the assessments in this case, the damages allowed in the Eleventh street case being only a fraction over one-third of the amount in that of Sixteenth street, yet the benefits assessed in Eleventh street amount to $23,726 more.

To show the injustice of same, suppose Congress should pass a law directing the extension of a street through a building such as the Catholic University, in Brookland, D. C.; and by such law require that one-half of the cost, "for and in respect to the land" should be assessed against the property within two thousand and five hundred feet of such street? In such an area of 5,000 feet square, there would be a fraction over 57 acres; suppose it to be worth $2,000 per acre; upon this plat of land we would have to assess one-half the cost of a million dollar building besides the land taken. Would that be "just compensation and due process of law?" It may be said that the legislature would not do such a thing; but that is not the question; has it the right to do so?

It is possible that Congress may have authority to fix a taxing district under certain circumstances. But to say that the legislature has a right to fix a *limited* taxing area upon which to levy an unascertained and uncertain sum, as taxation, which may be less or twice as much as the value of the land assessed, it seems to me, is wrong in principle. Can it be claimed that Congress could pass a law to take my property at such price as it might fix, and say I must take the amount allowed by such law, and that I should not have a hearing as to the value of same? Such a law, however, if I were allowed anything, would be more reasonable than taxing me without a hearing; for I would get something for the property in the first instance, and by levying upon me whatever may be necessary to pay for other property, it would be possible for me to get nothing. What are the provinces of the courts if such is the power of the lawmakers?

For further example, suppose we take the case of the United States post office, situated in Pennsylvania avenue of this city. There the awards amounted to about $675,000 for land taken and improvements. Suppose the law in that case had required that one-half of that large sum should be assessed upon the adjoining squares to the extent of 100 feet in depth. In such area there would be about 90,000 feet of land, and if placed at three dollars per foot would amount to $270,000, while the assessment against it would amount to $337,500. Would that have been just compensation? Such is the case at bar.

In the Davidson case the jury were left to place the benefits wherever found. The language of the court in the Davidson case places its opinion clearly upon the grounds that there was no limitation in the assessing area. Such is not this case. It stands distinctly alone and raises the questions as to whether Congress has a right to say that one-half of the cost of opening a wide avenue shall be assessed against a specific property, without a regard to benefits, and

is clearly in opposition to the doctrine laid down in the case of Norwood *vs.* Baker, 172 U. S. 269.

This court, it seems, in deciding the case of Wight *vs.* Davidson, was impressed with the idea that by sustaining the lower court it would interfere with the settled law in relation to special improvement tax for water mains, etc., but if such was the impression it appears to me it is ill founded.

To say a certain improvement to an existing street, such as laying water mains, sewers, etc., will benefit the property adjoining, is asserting that which is as well known as anything can be. And in this enlightened age we need not grope in the dark about such matters; common sense and past experience points out what the cost of such things are, and that they are comparatively small. It may well be said, that to put a water main in front of my property will benefit it to the extent of the cost; for it is adding an improvement, we might say a fixture, to it that I may use exclusively, to the extent of that part of it which is fronting on my property. The general public does not get any benefit of it; it is not like a waterworks, reservoir, or public highway. And past experience has informed us just what the cost will be, practically to the penny; no judicial or "legislative determination" is necessary. We know in advance what will be the consequence. But to say that the legislature can arbitrarily determine that property within a limited area will be benefited to a certain amount (by simply platting or marking out a street) and direct that it be so assessed, without any notice or hearing whatever, seems to me most unreasonable. It certainly is not "due process of law." It could not be so declared, because no hearing was given by the body that passed the act. It was not a law until it was approved by the President, at which time the "legislative determination" was over; for the act could not become a law until approved and before that is done

Congress has made its "legislative determination" without notice or hearing to anyone.

It seems to me, to say that property within a small area shall be assessed to the extent of the cost of purchasing land and buildings that stand in the line of a street extension is very unreasonable indeed.

The Court of Appeals Properly held that the Appellees were Entitled to a Trial by a Second Jury.

There is no doubt that the Court of Appeals was right in holding that by reason of the provisions of chapter 11, R. S. D. C., under which the proceedings were had, entitled the appellees to a second trial by a jury of twelve and I shall content myself by adopting what has been said in the Court of Appeals, in the three cases cited, viz, this case; Brown *vs.* MacFarland, and Todd *vs.* MacFarland, Vol. 30, No. 8, Washington Law Rep., p. —.

If the court finds it has any jurisdiction to entertain this case at all, I want to impress upon it, with great stress, the points made in this brief; for if the burdens placed upon the appellees by the verdict rendered, which the appellants heartlessly seek to have confirmed, is to stand many of them will be entirely deprived of their life savings.

Respectfully submitted.

LEO SIMMONS,
Attorney for Appellees.

31033